89-492

Supreme Court, U.S.
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CLERK

No. _____

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1989

HOSSEIN Z. NISTANK, aka JOHN NISTANK,
Petitioner,

-vs.-

SAROUSH KABOLI, aka STEVE KABOLI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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35 pp

QUESTIONS PRESENTED

Did the Trial Court violate the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution when it did the following:

(a) Failed to grant Petitioner Nistank's Motion for Involuntary Dismissal when it was admitted by Court and Respondent Kaboli that a prima facie case was not proved all in violation of State procedural rule NRCP 41(b);

(b) Failed to exclude an undisclosed expert witness in violation of State procedural rule NRCP 26(b)(4) and established case law and then entered a judgment based solely upon that expert witness' testimony;

(c) Failed to carry out the provisions of the Uniform Partnership Act (NRS 87.400)

and established case law concerning accounting and distribution upon dissolution of a partnership.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Hossein Z. Nistank, also known as, John Nistank, the Respondent, Saroush Kaboli, also known as, Steve Kaboli and Faramarz Fayeghi.

It is the belief of the Petitioner that Faramarz Fayeghi has no interest in the outcome of this proceeding for the reason that the claims against Mr. Fayeghi were dismissed in the lower court action and Petitioner does not seek review of that dismissal.

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1 NRCP refers to Nevada Rules of Civil Procedure

2 NRS refers to Nevada Revised Statutes

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The petitioner, Hossein Z. Nistank, also known as John Nistank (hereinafter referred to as "Nistank"), through counsel, respectfully prays that a writ of certiorari issue to review the Order Modifying Judgment and Dismissing Appeal and Cross-Appeal of the Supreme Court of the State of Nevada in the case of Saroush Kaboli, aka Steve Kaboli, Appellant/Cross-Respondent v. Hossein Z. Nistank, aka John

Nistank, Respondent/Cross Appellant v. Faramarz Fayeghi, Respondent, Case No. 17194, entered on the 30th day of March, 1989. (Order Denying Rehearing was entered on June 23, 1989.)

OPINIONS BELOW

The District Court of the Eighth Judicial District Court for Clark County, Nevada on August 14, 1985 entered a Decision in favor of Respondent Kaboli and against Petitioner, Nistank awarding Respondent Kaboli the sum of $222,000, together with statutory interest and costs. (Appendix Pages 11-13) On August 27, 1985 pursuant to the Decision referred to immediately above, Findings of Fact and Conclusions of Law were entered (Appendix Pages 14-20,) and on August 29, 1985 Judgment was entered in the Eighth Judicial District Court (Appendix Pages 21-23). On February 11, 1986 the Eighth Judicial District Court entered an Order (Appendix Pages 24-

25) which reaffirmed the Findings of Fact, Conclusions of Law and Judgment referred to above[1] .

On March 30, 1989, the Supreme Court of the State of Nevada in the case of Saroush Kaboli, aka Steve Kaboli, Appellant/Cross-Respondent v. Hossein Z. Nistank, aka John Nistank, Respondent/Cross Appellant v. Faramarz Fayeghi, Respondent, Case No. 17194, entered an Order Modifying Judgment and Dismissing Appeal and Cross-Appeal. Said Order is unpublished, and a copy is made part of the Appendix hereto (Appendix Pages 1-10.)

A timely motion for rehearing (Appendix Pages 28-44) was denied on June 23, 1989, without opinion by Order Denying Rehearing, which is part of the Appendix hereto (Appendix Pages 26-27.)

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1 The same had been previously vacated pursuant to stipulation of the parties in order to allow the submission of proposed findings, conclusions and judgments by both parties.

JURISDICTION

The Supreme Court of the State of Nevada entered an Order Modifying Judgment and Dismissing Appeal and Cross-Appeal from the Judgment of the District Court on March 30, 1989, and denied Motion for Rehearing on June 23, 1989. The jurisdiction of this Court is invoked under 28 U.S.C.§ 1257(a).

NEVADA STATUTES INVOLVED

The applicable provision of the Uniform Partnership Act is **NRS 87.400** which provides in part as follows:

> "87.400. **Rules for distribution**. In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:
>
> 1. The assets of the partnership are:
>
> (a) The partnership property; and
>
> (b) The contribution of the partners necessary for the payment of all the liabilities specified in subsection 2.
>
> 2. The liabilities of the partnership shall rank in order of payment, as follows:

(a) Those owing to creditors other than partners.

(b) Those owing to partners other than for capital and profits.

(c) Those owing to partners in respect of capital.

(d) Those owing to partners in respect of profits.

NRS 87.080 provides as follows:

"**Property of Partnership.**

1. All property originally brought into the partnership stock or subsequently acquired by purchase or otherwise, on account of the partnership, is partnership property.

2. Unless the contrary intention appears, property acquired with partnership funds is partnership property.

3. Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name.

4. A conveyance to a partnership in the partnership name, though without words of inheritance, passes the entire estate of the grantor unless a contrary intent appears."

NRS 87.180 provides in pertinent part as follows:

"**Rules determining rights and duties of partners**. The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:

1. Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits."

NRCP 26(b)(4) provides in pertinent part as follows:

(4) TRIAL PREPARATION: EXPERTS. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary

of the grounds for each opinion.

(ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule and subdivision (h) of Rule 30, concerning fees and expenses."

NRCP 41(b) states as follows:

"*Involuntary dismissal: Effect thereof.* For failure of the plaintiff to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has failed to prove a sufficient case for the court or jury. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other that a dismissal for lack of jurisdiction, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

CONSTITUTIONAL PROVISIONS INVOLVED

Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution.

STATEMENT OF THE CASE

The underlying action involved the adjudication of the partnership interest of Petitioner Nistank and Respondent Kaboli in a business known as G. M. Credit, which was dissolved on or about January 16, 1980. On May 27, 1980, Respondent Kaboli filed an action against Petitioner Nistank for an accounting and to determine his partnership interest.

On May 6, 1985, on the eve of the expiration of Nevada's five year requirement to bring a matter to trial[2] , trial was commenced

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2 NRCP 41(e) states in pertinent part as follows:

> "Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced . . . . unless such action is brought to trial within five years after the plaintiff has filed his action. . . ."

in the Eighth Judicial District Court. During the presentation of Respondent Kaboli's case-in-chief, Petitioner's accountant was called to testify to the assets, liabilities and capital accounts of G. M. Credit as of the date of dissolution, January 16, 1980. That testimony established that the assets remaining in G. M. Credit as of the date of dissolution were equal to or less than the value of Petitioner Nistank's capital account therein and that therefore, Mr. Kaboli was entitled to no distribution.

Both Mr. Kaboli and the Trial Court acknowledged that Mr. Kaboli had not produced any evidence upon which an award of damages to Mr. Kaboli could be supported. Indeed, it was clear from the commencement of the trial that Respondent Kaboli was relying upon Petitioner Nistank's accountant.[3]

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3 **Mr. Wells:** "As I told the Court yesterday in my opening statement, the breakthrough as far as our case is concerned came when they (Nistank and Fayeghi) started fighting with each other and did these accountings, had their own accountant, Mr. Glennon,

After Respondent Kaboli concluded his case-in-chief, having presented no accounting or valuation evidence to support his claims, Petitioner Nistank filed a Motion for Involuntary Dismissal (Appendix Pages 45-62). That Motion was denied. The Nevada Supreme Court in its Order Modifying Judgment and Dismissing Appeal and Cross-Appeal did not dispute the fact that Mr. Kaboli had failed to present an accounting upon which damages other than "nominal damages" could be awarded.[4]

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do it. That's all their work. We are relying on that."

(Appendix Page 54)

4 "Nistank's last contention is that the court erred in refusing to dismiss the case at the close of Kaboli's case-in-chief because Kaboli failed to present an accounting. However, Kaboli presented substantial evidence of a breach of a partnership agreement and nominal damages, at least, were available. He also presented some evidence of the partnership assets. It was then incumbent upon Nistank, as the party asserting the existence of liabilities, to rebut Kaboli's evidence. See Schunk v. Thickman, 436 P.2d 542 (Wyo. 1968). Thus, this contention is

Petitioner Nistank in his case-in-chief, presented additional evidence in support of his accountant's testimony, including evidence that he had immigrated to the United States from Iran with approximately $250,000 and had invested approximately $130,000 to capitalize G. M. Credit's business.

At the commencement of Respondent Kaboli's case-in-rebuttal he called as an expert witness, one John Lowther to testify concerning the valuation of the G. M. Credit business at the time of its dissolution. Petitioner Nistank's counsel vehemently objected to the calling of Mr. Lowther. The pertinent portion of the argument on that objection is stated as follows:

Petitioner Nistank's counsel:

> "My objection, your Honor, is two-fold at this point to testimony from him. If you recall, we did submit

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also without merit."

(Appendix Pages 8-9)

pretrial interrogatories on January 24th of 1984 in which we specifically asked for the names of any witnesses and expert witnesses in regard to this case. That was a year and a half ago."

"The obligation to respond to these interrogatories is obviously, as we're all aware of it, a continuing nature, and this man is an expert who has material testimony which we could have elicited from him even at deposition during the hiatus in this case. I was told yesterday that I could not talk to him prior to trial."

"The second basis is that valuation of the business is the sort of testimony and evidence that should have been put on by the plaintiff in the plaintiff's case in chief, and I think that the rules are quite clear that it may not be made a part of the rebuttal case of the defendant where the obligation to present evidence was incumbent upon the plaintiff in presenting his case in chief.

* * *

"Obviously the question of valuing the business was one of the key questions in this case and has been for the five years, over five years, that this case has been in litigation.

(R. VIII, pp. 1603-1605)

Respondent Kaboli's counsel:

"I only retained Mr. Lowther

approximately a month ago after the trial had commenced, as I remember, and I did that on the basis that the way the evidence was going, it was clear to me that I was not going to be able to have sufficient evidence, after Mr. Glennon spoke or testified, to establish my client's damages since Mr. Glennon testified about making revisions and adjustments and so on on the balance sheet."

"It was my feeling at that time that I needed an expert, and I wanted to see what the defendants were going to put on in terms of their evaluation of the business."

(emphasis added - R. VIII 1605-1606)

Petitioner Nistank's counsel:

"I just want to note for the record, and I can't cite chapter and verse in the proceedings, but I represent that it's in here that we had a discussion of this during the testimony of Mr. Glennon. And I believe, and I think the record will bear it out, that I noted at that time that it was my view that the plaintiff had to present evidence on this issue in this case."

"And I believe that the court assumed that he would, and he did not. The only testimony on this issue was presented by Mr. Glennon as called by the plaintiff himself. . ."

"It seems to me, in fact, that Mr. Wells during his opening statement and during the course of the initial proceedings even on one or more occasions represented that he would present expert testimony and he did not, and I could find that."

(R. VIII 1607-1608)

The Court:

"It would occur to the Court that this is testimony that should have been rendered by the plaintiff in his case in chief."

(R. VIII 1609)

Nevertheless, the lower court allowed the undisclosed expert, Mr. Lowther to testify as a rebuttal witness, and then relying exclusively upon the testimony of Mr. Lowther found in favor of Respondent Kaboli in the amount of $222,000, together with statutory interest and costs.[5]

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5 "The valuation of the business was made difficult by the inadequate business records and less than cooperative discovery phase. However, **the Court was impressed with the expertise of Mr. John Lowther in valuation of small businesses and finds his assessment of the value of the business to be realistic."**

The Trial Court refused to adjust the value that it accepted from Mr. Lowther for the liabilities outstanding as of the date of dissolution, and the capital account of Mr. Nistank, all as required by Nevada's Uniform Partnership Act, NRS Chapter 87.010, et seq.

The Trial Court was apprised of each of the serious procedural errors in a timely fashion. The Nevada Supreme Court was further advised that the failure to correct these procedural errors would result in a denial of due process. The Nevada Supreme Court did not address the specifics of the constitutional issue.

REASONS FOR GRANTING WRIT

I. Procedural Due Process

The Fifth and Fourteenth Amendments to the United States Constitution require notice, an opportunity to be heard and a fair

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(emphasis supplied)

(Appendix 12-13, Decision filed 8-14-85)

trial. The underlying action was one to adjudicate claims of partners to partnership property, which is governed by the Nevada Uniform Partnership Act. NRS Chapter 87.010, et seq. The property of this partnership is specifically defined in NRS 87.080 and the rules determining the rights and partners are specifically defined in NRS 87.180, which provides in pertinent part as follows:

> "**Rules determining rights and duties of partners**. The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:
>
> 1. Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits."

The taking of a partner's property contrary to the express provisions of the

Uniform Partnership Act and in violation of procedural rules resulted in a failure to provide notice and an opportunity to be heard in violation of the due process clause of the Fifth and Fourteenth Amendments of Due Process. Armstrong v. Manzo, 380 U.S. 545 at 552, 85 S.Ct. 1187 at 1191 (1965) provides as follows:

> "A fundamental requirement of due process is 'the opportunity to be heard.' Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783. It is an opportunity which must be granted at a meaningful time and in a meaningful manner."

Similarly, the Nevada Supreme Court has recognized that the Fifth and Fourteenth Amendments to the United States Constitution require a Trial Court to afford a litigant procedural due process and a fair trial. Ivory Ranch v. Quinn River Ranch , 101 Nev. 471, 705 P.2d 673 (1985). The Nevada Supreme Court further determined in that case that as a minimum, the procedural rules must be followed and any deviation form the rules

which results in fundamental unfairness or prejudice is a denial of due process.

Indeed, the Nevada Supreme Court in Ivory, supra cited with approval Jiminez v. Tuna Vessel Granada 652 F.2d 415 (5th Cir., 1981), a case in which the Fifth Circuit reversed the Trial Court on the basis that procedural due process had been denied, observing:

> "Notice remains a first-reader element of procedural due process, and trial by ambush is no more favored here than elsewhere."
>
> 652 F.2d at 420

A. Procedural Due Process was Violated When Petitioner's Motion for Involuntary Dismissal Pursuant To NRCP 41(b) Was Not Granted At the Conclusion of Respondent Kaboli's Case-in-Chief

As the Statement of Case demonstrates, Respondent Kaboli had failed to present evidence in support of his claims during his case-in-chief. Petitioner Nistank filed a Motion for Involuntary Dismissal (Appendix

Pages 45-62) citing the governing Nevada case law, Rasmussen v. Thomas, 98 Nev. 216, 644 P.2d 1030 (Nev. 1982) which makes clear that Nevada's Uniform Partnership Act requires an accounting as a predicate to division of the partnership assets. Petitioner pointed out that Respondent Kaboli's counsel acknowledged at the outset of the trial that his evidence would be based upon the testimony of Petitioner Nistank's accountant. However, the evidence of Petitioner Nistank's accountant established that the value of the assets remaining in G. M. Credit after the same was dissolved represented Petitioner Nistank's capital contributions to the entity. He further indicated that there was no evidence to support a capital contribution by Respondent Kaboli, even though Mr. Kaboli, as managing partner had been responsible for maintaining all of the books and records for the G. M.

Credit business.[6] The evidence was clear that all profits had been drawn out of the business prior to dissolution.[7]

In short, there was no evidence to support an award of damages to Mr. Kaboli at the conclusion of his case and it was a denial of procedural due process to fail to grant Petitioner Nistank's Motion for Involuntary Dismissal.

B. Allowing Respondent Kaboli to Present the Testimony of an Undisclosed Expert Witness Violated Procedural Due Process

As noted above, Respondent Kaboli failed to carry his burden of proof during his case-in-chief. During presentation of his rebuttal case,

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6 "While plaintiff was the managing partner, both parties drew significant sums of money from the business during the partnership for personal use.

(Appendix p. 12, Decision filed 8-14-85

7 "Each of the parties were entitled to and did receive one-half of the net profits of the business until January of 1980. "

(Findings of Fact and Conclusions of Law filed 8-27-85, Appendix p. 18)

Respondent Kaboli called an undisclosed expert witness to fill the acknowledged and obvious void in his case.

Petitioner Nistank's counsel objected on two grounds:

1. That the rules of discovery required respondent to disclose expert witnesses in response to pretrial Interrogatories; and

2. That the expert could not properly be called as a rebuttal witness since his testimony was required to be presented during Respondent Kaboli's case-in-chief.

Nevada's discovery rule relative to expert witnesses NRCP 26(b)(4)(a) is identical to the Federal Rule. The rules of discovery regarding disclosure of the identity of expert witnesses is fundamental to procedural due process. As the Tenth Circuit Court of Appeals noted in Smith v. Ford Motor Co. (10th Cir, 1980), 626 F.2d 784, 794:

> "Professor Friedenthal has also recognized the critical nature of such

pretrial discovery:

> *It is fundamental that opportunity be had for full cross-examination, and this cannot be done properly in many cases without resort to pretrial discovery, particularly when expert witnesses are involved.* Unlike two eye-witnesses who disagree, two experts who disagree are not necessarily basing their testimony on their views of the same objective features. Instead they may rely on entirely separate data, since the theoretical bases underlying their respective approaches may differ radically. *Before an attorney can even hope to deal on cross-examination with an unfavorable expert opinion he must have some idea of the bases of that opinion and the data relied upon. If the attorney is required to await examination at trial to get this information, he often will have too little time to recognize and expose vulnerable spots in the testimony.* He may need advice of his own experts to do so and indeed, in certain cases, his experts might require time to make further inspections and analyses of their own.

The need for pretrial discovery regarding expert witnesses is further evidenced by the ever-increasing dissatisfation with the honesty and reliability of

expert testimony. . . .

Friedenthal Discovery and Use of an Adverse Party's Expert Information. 14 Stan.L.Rev. 455, 485 (1962)[Footnote omitted]. [Emphasis supplied].

. . . .

[5] The failure of a party to comply with discovery requests under rule 26 has led to findings of prejudice resulting in the exclusion of the proffered evidence. Coleco Industries, Inc. v. Berman, 567 F.2d 569 (3d Cir. 1977), cert. denied, 439 U.S. 830, 99 S.Ct. 106, 58 L.Ed.2d 124 (1978); Tabachnick v. G. D. Searle & Co., 67 F.R.D. 49 (D.N.J. 1975). Similarly, although district courts enjoy wide discretion in handling discovery and pretrial matters. Phil Crowley Steel Corp. v. Macomber, Inc., 601 F.2d 342 (8th Cir. 1979), reversible error has been found in allowing testimony without such discovery where there has been a 'gross abuse of discretion resulting in fundamental unfairness in the trial of the case.' Voegeli v. Lewis, 568 F.2d 89, 96 (9th Cir. 1977); Shelak v. White Motor Co., 581 F.2d 1155 (5th Cir. 1978); Weiss v. Chrysler Motors Corp., 515 F.2d 449 (2d Cir. 1975)."

In Voegeli v. Lewis, (8th Cir., 1977), 568 F.2d 89, the reason for strict adherence to

discovery of expert opinions pretrial was explained:

> "Discovery of expert opinion must not be allowed to degenerate into a game of evasion. . . .Cf. Tabatchnick v. G. D. Searle, 67 F.R.D. 49 (D.N.J. 1975) (testimony of proposed new expert excluded because the need for such testimony and been clear three years earlier and defendants did not have an opportunity to prepare for trial and were unfairly prejudiced."

Additionally, Shelak v. White Motor Co., (5th Cir., 1978) 581 F.2d 1155, stated in part as follows:

> "Plaintiff's disregard for the federal rules of discovery in this area created a 'trial by ambush' which those rules are designed to prevent. The rules are designed to narrow and clarify the issues and to give the parties mutual knowledge of all relevant facts, thereby preventing surprise. Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947). In view of the delay between the time the complaint was filed and the trial, the plaintiff's argument that he was unable earlier to find a doctor who could connect the heart attack with the accident is not persuasive. It must be assumed that plaintiff's counsel had applied himself diligently to his client's cause for almost two years and yet unable to

> find, until the jury selection day, any qualified physician on the medical opinion that the incident caused the plaintiff's heart attack."

Respondent Kaboli had five years to prepare for the trial of this action, admitted at the beginning of the trial that he knew he needed an expert opinion to present his case, admitted at the commencement of the trial that the only expert opinion which would be offered was that of the Petitioner's accountant (whose opinion did not support Respondent Kaboli's case) acknowledged at the conclusion of his case-in-chief that he had adduced no evidence upon which his client could recover and admitted that during the trial and after his case-in-chief had concluded, he first consulted an expert who he then called during his rebuttal case.

The testimony of this undisclosed expert was patently prejudicial since the Trial Court based his entire decision upon this Expert's

valuation of the partnership. (Appendix. pp. 11-13)

C. Failure to Carry Out the Provisions of the Uniform Partnership Act and Established Case Law Concerning Accounting and Distribution Upon Dissolution of a Partnership Denied Petitioner Nistank Due Process of Law.

The Uniform Partnership Act concerning accounting on dissolution is unambiguous. The Nevada Supreme Court, prior to this case had ruled concerning the need for an accounting. Rasmussen v. Thomas, 98 Nev. 216, 644 P.2d 1030 (Nev. 1982). The rules for distribution upon dissolution of assets among partners is mandatory under NRS 87.400. Under those rules, the Court was required to return capital contributions and pay all liabilities prior to any distribution. The trial Court ignored the requests of Petitioner Nistank to do so, and the Supreme Court of Nevada ignored its prior decisions concerning this basic right.

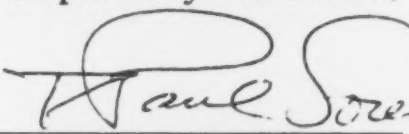
CONCLUSION

In the management of modern litigation, the role of the Court is clear. The Court must enforce its own rules and any deviations may not prejudice the litigant who relies upon the rules. The Trial Court ignored the mandatory language of Nevada's involuntary dismissal rule. The Trial Court further allowed an undisclosed expert witness to testify without an opportunity to depose him or to make inquiries into his qualifications and relationship with the parties and counsel, which would been done in the ordinary course. The Trial Court also ignored the mandates of the Uniform Partnership Act concerning accounting and distribution on dissolution. We believe the procedural dereliction resulted in a deprivation of due process of law as required by the Fifth and Fourteenth Amendments to the United States Constitution.

For these various reasons, this Petition

for Writ of Certiorari should be granted.

Respectfully submitted,



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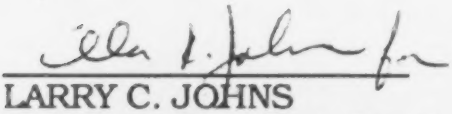

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PETITIONER'S APPENDIX

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IN THE SUPREME COURT OF THE STATE OF NEVADA

Filed March 30, 1989

No. 17194

SAROUSH KABOLI, aka STEVE KABOLI,

Appellant/Cross-Respondent,

vs.

HOSSEIN Z. NISTANK, aka JOHN NISTANK,

Respondent/Cross-Appellant,

vs.

FARAMARZ FAYEGHI,

Respondent.

ORDER MODIFYING JUDGMENT AND DISMISSING APPEAL AND CROSS-APPEAL

This is an appeal from an involuntary dismissal and a cross-appeal from the judgment. Appellant Kaboli sued respondent

Fayeghi and cross-appellant Nistank over the events concerning the G.M. Credit used car lot. The case against Fayeghi, alleging conversion and "unjust enrichment," was dismissed at the close of the plaintiff's case-in-chief. The bench trial continued with Nistank as the sole defendant, and the court found in favor of Kaboli, awarding him $222,000.00 plus interest and costs.

Involuntary Dismissal

Kaboli contends that the district judge erred in dismissing his suit against Fayeghi because there was substantial evidence that Fayeghi converted Kaboli's interest in the partnership and the assets of the partnership to his own use.

First, Fayeghi did not convert Kaboli's interest in the partnership because a partnership interest is not property that can be converted. Intangible personal property can be converted only when it has been

merged into a more tangible form such as bills, notes, stock certificates and bonds.

Second, Kaboli did not prove a prima facie case that Fayeghi converted partnership assets. If the partnership between Kaboli and Nistank still existed at that point, Nistank still had possession as a partner. Therefore, nothing was converted. When a plaintiff fails to prove a prima facie case of conversion, the appropriate action is dismissal.[1] See Bader v. Cerri, 96 Nev. 352, 609 P.2d 314 (1980).

Finally, the court correctly dismissed Kaboli's unjust enrichment claim against Fayeghi because there was no contractual or quasi-contractual relationship between Kaboli and Fayeghi. Restitution is available when one party has furnished a benefit to another party

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1 Assuming that the partnership had been dissolved prior to Fayeghi's acts, then Kaboli would have even less rights to the inventory. In that case, he may have had the right to obtain half of the assets from Nistank or force liquidation, but as partner to Nistank, any possession of the assets that Fayeghi held in his partnership with Nistank was not wrongful. See NRS 87.420.

under circumstances where it is just to require restitution. Union American Mortgage v. McDonald, 97 Nev. 210, 626 P.2d 1272 (1981). There is no evidence that Kaboli has furnished a benefit to Fayeghi. While Fayeghi eventually acquired an interest in the business, he acquired it from Nistank, not Kaboli.

Cross-Appeal

Nistank first contends that the court abused its discretion by refusing to allow the case to be consolidated with another case involving Nistank and Fayeghi. The motion to consolidate is addressed to the sound discretion of the court. Ward v. Sheeline Banking and Trust Co., 54 Nev. 442 (1933). The court may order consolidation where there are common questions of law and fact. NRCP 42(a). The two cases did not involve common questions of law and fact, so the court could not have properly consolidated them. Nistank's contention is without merit.

Neither do we agree that the court abused its discretion in allowing Kaboli to amend his complaint to allege a count of conversion against Nistank. The judgment was not based on a claim of conversion. Thus, Nistank was not prejudiced by the exercise of discretion.

Nistank next contends that the court erred in allowing the action to proceed without Fayeghi as a party. There are two types of necessary parties: one in whose absence "complete relief cannot be accorded among those already parties," NRCP 19(a), and one who

> claims an interest relating to the subject of the action and is so situated that the disposition of the action may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

NRCP 19(a).

Nistank does not specify which type of necessary party he alleges Fayeghi to be. However, it is apparent that complete relief was available between Kaboli and Nistank because the court awarded only money damages against Nistank. He also cannot show that the second type of necessary party applies. Kaboli claimed no interest in the partnership between Nistank and Fayeghi. He claimed instead that his partnership with Nistank had been dissolved and that he was entitled to damages against Nistank personally.

Nistank alleges error in the court's allowance of Kaboli's evidence of damages on rebuttal. Since Nistank did not present evidence on damages in his defense case-in-chief, he asserts that the court could not allow that evidence on rebuttal. Where there is no right to present rebuttal evidence, the trial judge may, nevertheless, in his discretion, allow the evidence to be presented. See, e.g.,

State Farm Mut. Auto. Ins. Co. v. Shuman, 370 N.E.2d 941 (Ind. App. 1978). We think that the court had the discretion to allow the evidence and that there was no abuse of discretion in this case, particularly here, where the record does not reflect that Nistank was in any way prevented from presenting surrebuttal evidence.

Nistank next argues that there is insufficient evidence to support a finding that that Kaboli and Nistank were partners. We disagree. The evidence showed that the two shared the profits of the business and that both had contributed capital. Where there is substantial evidence supporting a factual finding that there was a partnership, that finding will not be disturbed. Dielman v. Sendleim, 99 Nev. 768, 670 P.2d 578 (1983).

We also reject Nistank's argument that there can be no recovery when both partners occasion the dissolution. Upon dissolution, all

partners, even those at fault, are entitled to their respective shares of the business. NRS 87.380(1).

Nistank's next contention, that the court erred in allowing prejudgment interest, has not been preserved for appeal.[2] The issue was never pointed out to the court through motion or otherwise. By failing to bring the issue to the attention of the trial court, Nistank has waived it on appeal. Montesano v. Donrey Media Group, 99 Nev. 644, 668 P.2d 1081 (1983).

Nistank's last contention is that the court erred in refusing to dismiss the case at the close of Kaboli's case-in-chief because Kaboli failed to present an accounting. However, Kaboli presented substantial evidence of a breach of a partnership

---

2 The parties have stipulated that the judge applied the incorrect rate of interest, and that question concerning the rate of interest was preserved for appeal. This issue concerns only the question of the availability of any prejudgment interest, not the rate.

agreement, and nominal damages, at least, were available. He also presented some evidence of the partnership assets. It was then incumbent upon Nistank, as the party asserting the existence of liabilities, to rebut Kaboli's evidence. See Schunk v. Thickman, 436 P.2d 542 (Who. 1968). Thus, this contention is also without merit.

We affirm the judgment in all respects except one. The parties have stipulated, pursuant to our previous order, that the court erred in allowing for interest at twelve percent and that the proper interest rate should have been eight percent. Therefore, the judgment is amended to allow for interest at eight percent from the date of service of process. The judgment is affirmed in all other respects, and we

ORDER this appeal dismissed.[3]

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[3] The Honorable Robert E. Rose, Justice, did not participate in the decision of this appeal.

/s/ Young, CJ.
Young

/s/ Steffen, J.
Steffen

/s/ Springer, J.
Springer

/s/ Mowbray, J.
Mowbray

cc: Hon. Howard W. Babcock, District Judge
Brown, Wells, Beller & Kravitz
Johns & Johns
Eva Garcia
Loretta Bowman, Clerk

IN THE EIGHTH JUDICIAL DISTRICT COURT

OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

Filed August 14, 1985

Case No. A 196844

SAROUSH KABOLI, aka STEVE KABOLI,	)
Plaintiff,	)
vs.	)
HOSSEIN Z. NISTANK, aka JOHN NISTANK; FARAMARZ FAYEGHI; G. M. CREDIT, et al.,	)

DECISION

The facts in this case have been clouded by directly conflicting testimony and inadequate records. Neither party can be commended for following good business practices. However, uncontroverted testimony proves that the parties agreed to split the profits of the business equally. This fact

strongly supports finding that the parties were in partnership. (NRS 87.070(4))

The plaintiff started the business and later the defendant became a partner after making capital contributions. While plaintiff was the managing partner, both partners drew significant sums of money from the business during the partnership for personal use. Eventually the business had difficulties with the City of North Las Vegas which resulted in a temporary closure of the business in January of 1980.

The Court finds that the actions of both parties led to the dissolution of the partnership effective January of 1980. The plaintiff is entitled to recover 50% of the profits generated by the business up to that date.

The valuation of the business was made difficult by the inadequate business records and less than cooperative discovery phase.

However, the Court was impressed with the expertise of Mr. John Lowther in valuation of small businesses and finds his assessment of the value of the business to be realistic.

Therefore, plaintiff is entitled to judgment against defendant, Hossein Z. Nistank aka John Nistank in the sum of $222,000, together with statutory interest and costs. Each party shall bear their own attorney's fees.

Counsel for plaintiff is directed to prepare findings of fact, conclusions of law and judgment.

DATED this 14th day of August, 1985.

HOWARD W. BABCOCK
DISTRICT JUDGE

IN THE EIGHTH JUDICIAL DISTRICT COURT

OF THE STATE OF NEVADA IN AND FOR THE

COUNTY OF CLARK

Filed August 27, 1985

Case No. A 196844

SAROUSH KABOLI, aka STEVE KABOLI,

Plaintiff,

vs.

HOSSEIN Z. NISTANK, aka JOHN NISTANK; FARAMARZ FAYEGHI; G. M. CREDIT; et al,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on May 6, 1985, in Dept. VI of the above entitled Court, the Honorable Howard W. Babcock, Judge, presiding without a jury, and the trial was concluded on June 19, 1985. Plaintiff SAROUSH KABOLI, aka STEVE

KABOLI, appeared by BROWN, WELLS, BELLER & KRAVITZ, his attorneys, and Defendants HOSSEIN Z. NISTANK, aka JOHN NISTANK, and G.M. CREDIT appeared by their attorneys, JOHNS & JOHNS, and Defendant FARAMARZ FAYEGHI, aka FRED FAYEGHI, appeared by his attorneys, GIBBONS & BERMAN.

Said cause having been heard, evidence both oral and documentary having been introduced, and said cause having been submitted for a decision, the Court having rendered its decision in favor of Plaintiff and against Defendant HOSSEIN Z. NISTANK, aka JOHN NISTANK, now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

The Court finds that:

1. On or about September 1978 Kaboli and Nistank agreed to form a used car business known as G.M. Credit located at 2445 Las Vegas Blvd. North, North Las Vegas, Nevada.

Prior to commencing the G.M. Credit business at this location, Kaboli had lived on the premises and had a lease with the land owner, Dr. Sol de Lee. Pursuant to the agreement between Kaboli and Nistank, both parties contributed both capital and other valuable improvements to the G.M. Credit business.

2. The parties agreed that all profits generated by the used car would be divided equally between them and that Kaboli would manage the business. The parties further agreed that in light of Nistank's ongoing problems with the Immigration and Naturalization Department, the business license and license with the Nevada Department of Motor Vehicles would be in Nistank's name.

3. The parties operated the business from September 1978 through January 1980, each party withdrawing substantial sums of

money from the business pursuant to the agreement.

4. The parties kept inadequate records concerning the division of profits and losses from the operation of the G.M. Credit business. Defendant Nistank caused Kaboli to be excluded from the business premises on or about January 16, 1980, and after that Kaboli did not have access to or control over any of the books and records of the G.M. Credit business.

5. At or about the time the G.M. Credit business lost its business license with the City of North Las Vegas temporarily, Nistank wrongfully excluded Kaboli from the business premises and thereafter took over all of the assets of the business.

6. On or about January 16, 1980, Kaboli had an equal interest with Nistank in the business known as G.M. Credit but was denied his interest by Nistank and damaged thereby.

The value of the business known as G.M. Credit as of January 1980 was $444,000, half of which belonged to Kaboli.

7. Each of the parties were entitled to and did receive one-half of the net profits of the business until January of 1980. Nistank continued to operate the G.M. Credit business subsequent to January of 1980 and derived in excess of $1 Million in profits from the operation of such business through 1984.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact the Court makes the following Conclusions of Law:

1. The partnership agreement between Kaboli and Nistank was breached by Nistank when he excluded Kaboli from the premises and converted all partnership assets to his own use. Such breach gives rise to, among other things, a cause of action for damages on the part of Kaboli pursuant to NRS 87.380.

2. The proper assessment of damages does not include any share of the profits generated by the G.M. Credit business subsequent to January of 1980, but should include one-half of the fair market value of the business as of January of 1980.

3. The Plaintiff, having failed to establish the necessary elements of his cause of action against Defendant Faramarz Fayeghi, therefore is not entitled to judgment against this Defendant.

4. The Plaintiff is entitled to judgment against Defendant Hossein Z. Nistank, aka John Nistank, in the sum of $222,000 together with statutory interest and costs.

5. Pursuant to NRS 17.130 Plaintiff is entitled to recover interest on his judgment at the rate of twelve (12%) percent per annum commencing on May 30, 1980, the date that Defendant Nistank was served with the

Summons and Complaint, such interest to accrue until the judgment is satisfied.

6. Defendant Nistank, as counterclaimant, has failed to establish the elements for recovery on his Counterclaim and is therefore not entitled to judgment against Plaintiff Kaboli.

Judgment is hereby ordered to be entered accordingly.

DATED this 26th day of August, 1985.

/s/ HOWARD W. BABCOCK
DISTRICT JUDGE

BROWN, WELLS, BELLER &
KRAVITZ, CHTD.

BY: /s/ Kirby R. Wells
KIRBY R. WELLS, Esquire
Attorneys for Plaintiff
520 South Fourth Street
Las Vegas, Nevada 89101

IN THE EIGHTH JUDICIAL DISTRICT COURT

OF THE STATE OF NEVADA IN AND FOR THE

COUNTY OF CLARK

Filed August 29, 1985

Case No. A 196844

SAROUSH KABOLI, aka STEVE KABOLI,	)
Plaintiff,	)
vs.	)
HOSSEIN Z. NISTANK, aka JOHN NISTANK; FARAMARZ FAYEGHI; G. M. CREDIT; et al,	)
Defendant.	)

JUDGMENT

This action came on for trial before the Court, the Honorable Howard W. Babcock, District Judge, presiding and the issues having been duly tried and a decision having been duly rendered.

IT IS ORDERED AND ADJUDGED that in accordance with the Findings of Fact and Conclusions of Law Plaintiff SAROUSH KABOLI, aka STEVE KABOLI, is entitled to judgment against Defendant HOSSEIN Z. NISTANK, aka JOHN NISTANK, in the amount of TWO HUNDRED TWENTY-TWO THOUSAND and no/100ths ($222,000.00) DOLLARS, plus interest at the rate of twelve (12%) percent per annum commencing May 30, 1980, in the sum of ONE HUNDRED EIGHTY THOUSAND NINE HUNDRED SEVENTY-FIVE and no/100ths ($180,975.00) DOLLARS, plus costs in the sum of FOUR THOUSAND SEVEN HUNDRED EIGHTY-FOUR and 28/100ths ($4,784.28) DOLLARS, for a total judgment of FOUR HUNDRED SEVEN THOUSAND SEVEN HUNDRED FIFTY-NINE and 28/100ths ($407,759.28) DOLLARS.

DATED this 29th day of August, 1985.

/s/ HOWARD W. BABCOCK
DISTRICT JUDGE

BROWN, WELLS, BELLER &
KRAVITZ, CHTD.

BY: /s/ Kirby R. Wells
KIRBY R. WELLS, Esquire
Attorneys for Plaintiff
520 South Fourth Street
Las Vegas, Nevada 89101

IN THE EIGHTH JUDICIAL DISTRICT COURT

OF THE STATE OF NEVADA IN AND FOR THE

COUNTY OF CLARK

Filed February 11, 1986

Case No. A 196844

SAROUSH KABOLI, aka STEVE KABOLI,

Plaintiff,

vs.

HOSSEIN Z. NISTANK, aka JOHN NISTANK; FARAMARZ FAYEGHI; G. M. CREDIT; et al,

Defendant.

ORDER

Pursuant to a stipulation dated October 23, 1985, between plaintiff Kaboli and defendant Nistank, defendant's motion to amend the findings of fact and conclusions of law scheduled for hearing on October 24, 1985, was vacated and the parties agreed to

submit proposed findings of fact, conclusions of law and judgment for the Court to consider.

Upon review of the submitted proposed findings of fact and conclusions of law, it is

ORDERED that the Findings of Fact, Conclusions of Law and Judgment previously submitted by the plaintiff, approved by the Court, and filed are hereby reaffirmed.

DATED this 11th day of February, 1986.

/s/ HOWARD W. BABCOCK
DISTRICT JUDGE

IN THE SUPREME COURT OF THE STATE OF NEVADA

Filed June 23, 1989

No. 17194

SAROUSH KABOLI, aka STEVE KABOLI,

Appellant/Cross-Respondent,

vs.

HOSSEIN Z. NISTANK, aka JOHN NISTANK,

Respondent/Cross-Appellant,

vs.

FARAMARZ FAYEGHI,

Respondent.

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.[1]

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[1] Further, we deny appellant's request for sanctions. NRAP 38. The Honorable Robert E. Rose, Justice, did not participate in the decision of this appeal.

/s/ Young, C.J.
Young

/s/ Steffen, J.
Steffen

/s/ Springer, J.
Springer

/s/ Mowbray, J.
Mowbray

---

cc: Hon. Howard W. Babcock, District Judge
Brown, Wells, Beller & Kravitz
Johns & Johns
Eva Garcia
Loretta Bowman, Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

Filed April 17, 1989

No. 17194

SAROUSH KABOLI, aka STEVE KABOLI,

Appellant/Cross-Respondent,

vs.

HOSSEIN Z. NISTANK, aka JOHN NISTANK,

Respondent/Cross-Appellant,

vs.

FARAMARZ FAYEGHI,

Respondent.

PETITION FOR REHEARING

COMES NOW, Respondent/Cross-Appellant pursuant to NRAP 40, and petitions for rehearing of the Order Modifying Judgment and Dismissing Appeal and Cross-Appeal entered by this Court on March 30, 1989 and in support thereof states as follows:

Introduction

The effect of this Court's decision and that of the lower court is to give the Plaintiff, KABOLI a windfall of $222,000. The basis of this windfall was incompetent and improperly admitted evidence concerning the value of the business **after** the date of dissolution. There was competent testimony by two accountants that no accounting could be completed for the period KABOLI was the managing partner of the business. KABOLI had the burden of proof to produce a competent accounting for the period of his management and did not do so. If the testimony relied upon by the lower court in calculating the amount of the judgment was proper, the court still failed to reduce the value to be distributed by the amount of debts outstanding and capital that had been contributed by both Mr. Nistank and Mr. Fayeghi prior to the dissolution of the partnership. If the computation had been

done correctly, this would have left only approximately $139,000 to be divided between Mr. Nistank and Kaboli, or $69,500 each. Even awarding $69,500 would be improper as it in effect would be a finding that a managing partner will be rewarded for neglecting his duties. The closure and incomplete bookkeeping was the responsibility of KABOLI who was found to be the managing partner.

This Court's decision overlooked or misapprehended facts and law concerning the dissolution of a partnership all as reflected herein.

Argument

1. Where the lower court specifically found that the partnership was dissolved by the actions of both partners, the failure to then follow the specific mandates of the Nevada Uniform Partnership Act (NRS Ch. 87) which in that instance requires first the payment of all outstanding partnership debts

and then the return of capital contributions is a violation of a statutory scheme designed to comply with the due process clause and that failure constitutes a taking of property (a partner's capital contribution) without due process of law.

The Decision entered by The Honorable Howard W. Babcock, District Judge, on August 14, 1985, states as follows:

"DECISION

The facts in this case have been clouded by directly conflicting testimony and inadequate records. Neither party can be commended for following good business practices.

However, uncontroverted testimony proves that the parties agreed to split the profits of the business equally. This fact strongly supports finding that the parties were in partnership.
(NRS 87.070(4))

The plaintiff started the business and later the defendant became a partner after making capital contributions. While plaintiff was the managing partner, both partners drew significant sums of money from the business during the partnership for personal use. Eventually the business had difficulties with the City of North Las Vegas

which resulted in a temporary closure of the business in January of 1980.

The Court finds that the actions of both parties led to the dissolution of the partnership effective January of 1980. The plaintiff is entitled to recover 50% of the profits generated by the business up to that date.

The valuation of the business was made difficult by the inadequate business records and less than cooperative discovery phase. However, the Court was impressed with the expertise of Mr. John Lowther in valuation of small businesses and finds his assessment of the value of the business to be realistic.

Therefore, plaintiff is entitled to judgment against defendant Hossein Z. Nistank aka John Nistank in the sum of $222,000, together with statutory interest and costs. Each party shall bear their own attorney's fees.

Counsel for plaintiff is directed to prepare findings of fact, conclusions of law and judgment."

(ROA pp.754-755)

The lower court having clearly decided that "the actions of both parties led to the dissolution of the partnership effective January of 1980" the applicable provision of

the Uniform Partnership Act is NRS 87.400 which provides in part as follows:

> "87.400. **Rules for distribution.** In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:
>
> 1. The assets of the partnership are:
>
> (a) The partnership property; and
>
> (b) The contribution of the partners necessary for the payment of all the liabilities specified in subsection 2.
>
> 2. The liabilities of the partnership shall rank in order of payment, as follows:
>
> (a) Those owing to creditors other than partners.
>
> (b) Those owing to partners other than for capital and profits.
>
> (c) Those owing to partners in respect of capital.
>
> (d) Those owing to partners in respect of profits.

This Court's Order makes no mention of the "Rules for Distribution" in settling the accounts of a dissolved partnership

- a clear basis for reconsideration and rehearing, since NISTANK emphatically argued in his briefs that an accounting had to be conducted in order to distribute the assets under the Uniform Partnership Act.[1]

Instead of following the clear mandate of NRS 87.400 which would have required the payment to the Department of Motor Vehicles of $20,000.00 in delinquent taxes not paid by Mr. Kaboli while he was the manager of the business or the return to Mr. Nistank of the $260,370.00, the amount the accountant documented Mr. Nistank had contributed as his capital contribution at the time GM Credit obtained its business license from North Las Vegas (under Mr. Nistank's name alone) in September, 1978 and began selling cars, the Court simply accepted an appraisal of the business not based upon any

---

[1]See Nistank's Reply Brief,, Section IV, pages 7-9; Nistank's Answering and Opening Brief, Section III, pages 15-18.

information extant as of the date of dissolution (January, 1980) but based upon profits generated during 1980 after GM Credit was reopened[2] in early February, 1980 and substantial additional capital was contributed.[3]

Even assuming that the appraiser, Mr. Lowther, could properly be allowed to proffer his opinion on value, the lower court's award to Kaboli of one-half of the $444,000 valuation did not consider (1) the debt to the Department of Motor Vehicles, a creditor under NRS 87.400; (2) or the $260,370,00 capital contribution made by Nistank and $25,000 contributed by Fayeghi to purchase the cars and operate the business. Simple

---

[2]North Las Vegas had closed down the business on 16 January 1980 because of zoning violations. Mr. Nistank had to post a $10,000 .00 bond and expend some $10,000.00 in construction costs to reopen several weeks after the Kaboli/Nistank partnership was dissolved.

[3]Mr. Fayeghi testified he contributed $25,000.00, including paying one-half of the North Las Vegas $10,000 bond.

mathematics would show that the $444,000 had to be reduced as follows:

	$444,000.00
DMV-creditor	-20,000.00
	424,000.00
Capital contribution-Nistank	-260,370.00
Additional contribution-Fayeghi	-25,000.00
	$138,640.00

NISTANK will now demonstrate the lower Court's error in allowing Mr. Lowther to testify when (1) he had never been disclosed prior to trial (a clear violation of the rules of discovery, turning court proceeding into "trial by ambush";) and (2) he was called in rebuttal but didn't rebut any testimony; rather he was allowed to be brought in over Nistank's objection after it was clear Kaboli had presented no evidence in his case-in-chief to support an award -- the accountant he called as his first witness at trial, Mr. Glennon who was the accountant for GM Credit -- showed that under proper accounting procedures and

distribution under the Uniform Partnership Act, Kaboli was entitled to nothing.[3]

2. Where the lower court violated the rules of discovery by permitting Plaintiff to call as a witness an undisclosed expert witnesses and violated the Rules of Evidence by permitting Plaintiff to present that undisclosed expert witness to testify for the

---

[3] Mr. Kaboli's counsel admitted he had proved no damages. He stated as follows:

> "I only retained Mr. Lowther approximately a month ago after the trial had commenced, as I remember, and I did that on the basis that the way the evidence was going, it was clear to me that I was not going to be able to have sufficient evidence, after Mr. Glennon spoke or testified, **to establish my client's damages** since Mr. Glennon testified about making revisions and adjustments and so on on the balance sheet.
>
> **It was my feeling at that time that I needed an expert**, and I wanted to see what the defendants were going to put on in terms of their evaluation of the business."
>
> (emphasis added, ROA pp. 1605-1606)

The Court then conceded:

> "It would occur to the Court that this is testimony that should have been tendered by the plaintiff in his case in chief."
>
> (ROA p. 1609)

first time in rebuttal, Defendant was denied due process of law. These violations are particularly egregious and prejudicial where the Court thereafter based its entire decision upon that improper and incompetent evidence. There has been a denial of due process.

At the conclusion of Plaintiff's case, there was simply **no evidence** upon which the lower court **could base an award of damages** for Mr. Kaboli and Mr. Kaboli's counsel knew this (see Footnote No. 3.)

The accountant expert Mr. Glennon had presented compelling and competent evidence that the partnership as of January 1980 had insufficient capital to pay (1) the Department of Motor Vehicles $20,000.00 tax delinquency (2) Nistank's capital contribution and (3) Fayeghi's capital contribution. Therefore, a winding up at that

point based upon proper application of the Uniform Partnership Act left Kaboli nothing.

NISTANK filed a ten page motion for 41(b) dismissal, because **KABOLI had failed to adduce any evidence to support his claim** (ROA pp. 629-639). NISTANK raised the identical points raised herein, citing NRS 87.400 and a series of cases right on point which make clear that the **assets can't be divided until the liabilities are taken care of**, including the following excerpt from this Court's decision in Rasmussen v. Thomas, 99 Nev. 216, 644 P.2d 1030 (1982):

> "Ordinarily, actions between partners with respect to partnership business are not maintainable until there has been an accounting or settlement of the partnership affairs. See Clark v. Edris, 585 P.2d 264 (Ariz. App. 1978); Lau v. Valu-Bilt Homes, Ltd., 582 P.2d 195, 200 (Hawaii 1978); Ewing v. Owens,441 P.2d 964, 966 (Okla. 1968)."

The cases cited by this Court in Rasmussen likewise demonstrate that dismissal was proper.

Nevertheless, when the lower court denied the 41(b) motion, NISTANK was compelled to present his case. Therein he established[4] again that KABOLI was not entitled to anything because if the assets and liabilities as of 18 January 1980 were divided, there was nothing left other than payment of liabilities and return of capital. Moreover, since the lower court found that "plaintiff [Kaboli] was the managing partner" it was his (not Nistank's) responsibility and fiduciary duty to account for the assets and liabilities and he had done so during Plaintiff's case-in-chief.

The lower court's allowing Plaintiff to violate the rules of discovery (NRCP 26-35) and to ignore sworn Answers to Interrogatories wherein they had not disclosed

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[4] This Court's Order at page five suggests that Nistank had the burden of proof of liabilities. Schunk v. Thickman, 436 P.2d 542 (Wyo. 1968). That burden was carried when accountant Glennon laid out in Plaintiff's case-in-chief the liabilities. Thus, there was no need to present any additional evidence.

any expert witnesses and to thereafter call an undisclosed expert witness (John Lowther) ostensibly as a rebuttal witness after Plaintiff rested his case-in-chief constitutes an abuse of discretion in violation of this Court's decision in Morrison v. Air California, 101 Nev. 237, 699 P.2d 600 (1985) which clearly permitted rebuttal evidence **only where Defendant has introduced some evidence which Plaintiff ought thereafter to be allowed to rebut.** Morrison, p. 237. In this case the **evidence at the close of Plaintiff's case-in-chief established that dissolution and distribution under NRS 87.400 totally depleted the assets.**

Conclusion

Respectfully, this Court's Order of Dismissal has misperceived the facts and the law applicable to this case. On 18 January 1980 the Nistank/Kaboli partnership was dissolved through the actions of both parties. Judge Babcock so found. There was then

nothing to do but follow the specific mandates of NRS 87.400 regarding distribution. The lower court gave Mr. Kaboli an enormous windfall by permitting Mr. Lowther to testify in rebuttal as to the value of GM CREDIT (not as of 18 January 1980, but as of the end of December, 1980). The lower court then awarded Mr. Kaboli one-half of that appraised value without making him pay one-half of the liabilities ($20,000.00 for delinquent DMV sales taxes owed for 1978-1979) and then failed to return capital contributions shown to be owing: $260,370.00 to Nistank and the $25,000 capital contribution by FAYEGHI. Such is patent error.

For the reasons stated above, Appellant respectfully requests

that this Court's Order Modifying Judgment and Dismissing Appeal and Cross-Appeal be reconsidered and the Trial Court's decision reversed.

Respectfully submitted,

JOHNS & JOHNS, LTD.

BY:/s/ Larry C. Johns/rps
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323 Las Vegas Blvd. South
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CERTIFICATE OF MAILING

The undersigned certifies that she is an employee of the offices of JOHNS & JOHNS, and on this 16th day of April, 1989, she deposited for mailing, postage prepaid, at Las Vegas, Nevada, true copies of the Petition for Rehearing, addressed to:

Kirby R. Wells, Esq.
BROWN,WELLS, KRAVITZ & SCHNITZER
520 South Fourth Street
Las Vegas, Nevada 89101

Eva Garcia, Esq.
501 South Seventh Street
Las Vegas, Nevada 89101

/s/ Sarah S. Higgins
An Employee of offices of
JOHNS & JOHNS, LTD.

IN THE EIGHTH JUDICIAL DISTRICT COURT

OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

Filed June 10, 1985

Case No. A 196844

SAROUSH KABOLI, aka STEVE KABOLI,	)
Plaintiff,	)
vs.	)
HOSSEIN Z. NISTANK, aka JOHN NISTANK; FARAMARZ FAYECHI; G. M. CREDIT, et al.,	)

MOTION FOR INVOLUNTARY DISMISSAL

COMES NOW DEFENDANT JOHN NISTANK, by and through his attorneys, JOHNS & JOHNS, LTD., and moves to dismiss the action filed by Plaintiff.

This motion is made and based upon the points and authorities filed herewith together will all of the pleadings and papers on file

herein.

DATED this 10th day of June, 1985.

JOHNS & JOHNS, LTD.

BY:/s/ Larry C. Johns
LARRY C. JOHNS, ESQ.
Attorneys for
Defendant NISTANK
601 E. Bridger Avenue
Las Vegas, Nevada
89101

POINTS AND AUTHORITIES

Plaintiff, Steve Kaboli, filed this action against John Nistank as an individual and G.M. Credit, a business which holds a business license with the City of North Las Vegas. Fred Fayeghi is also a named Defendant. The causes of action in the Complaint are for (1) wages from Nistank and/or G.M. Credit since Kaboli asserts that regardless of the nature of the business known as G.M. Credit (sole proprietorship, partnership) Nistank promised to pay Kaboli "$500.00 per week, plus 50% of the net profits of the partnership." Page 3 of

Complaint filed May 27, 1980. The Second Cause of Action is for rent due in the amount of $10,670.00 from September 1, 1978 through January 31, 1980. Both of the foregoing claims for relief are founded upon Exhibits A and B attached to the verified Complaint, letters sent to Nistank on January 21 and 22, 1980.

The Third Claim for Relief seeks an accounting of the profits of G.M. Credit. The Fourth Claim for Relief is one for breach of the partnership agreement, while the Fifth Claim for Relief is for breach of contract. The Sixth Claim for Relief is for unjust enrichment, the Seventh for a receivership, and the Eighth seeks injunctive relief.

For purposes of this Motion pursuant to Rule 41(b) the following facts have been testified to by Plaintiff Kaboli. Without Defendant Nistank presenting evidence, it will be clear that Mr. Kaboli cannot prevail on any of his causes of action and that by his own

admissions under oath, he has made material misrepresentations contradicting the allegations of his verified Complaint. The uncontested and admitted facts are as follows:

For example, Exhibit "A", a letter to Nistank dated 21 January, 1980, was attached to the verified Complaint filed May 17, 1980, and at that time verified to be accurate and true. However, at the trial of this action, Kaboli testified that the matters set forth in that letter and Exhibit "B", a letter to Nistank dated January 22, 1980, were not accurate. Here is exactly what Mr. Kaboli stated:

> **Q. (Mr. Wells)** "And I'm going to show you now what has been marked for identification as Plaintiff's Exhibits 16 [Exhibit "A" to the Complaint.] and 17 [Exhibit "B" to the Complaint.] and ask you if these are true and correct copies of the letters which you just referred to.
>
> **A. (Kaboli)** Yes, Your Honor.
>
> **Q.** Do they bear your signature?
>
> **A.** Yes.
>
> **Mr. Wells.** I would offer 16 and 17, your Honor.
>
> **Mr. Berman.** No objection.
>
> **Mr. Johns.** No objection.

The Court. Admitted.

Q. (Mr. Wells) Now, are you telling the Court that what is contained in these letters is not really accurate?

A. No, it's not.

Q. Why is it not?

A. The letter number one is talking about my lease, my rent money. If this letter, we did not agree about this letter between ourselves, in order they do not lose the place of the business, at least they would go and pay me the amount of money that for the lease I was demanding it.

So far as we knew between ourselves, we are doing just, we are acting, in order to reopen the place. . . "

Trial Transcript pages 132-133

Both the First and Second Causes of Action were predicated upon these two demand letters sent by Plaintiff to Defendant Nistank on January 21, 1980 [Exhibit "A"] and January 22, 1980 [Exhibit "B"]. They were attached as Exhibits "A" and "B" to the verified Complaint signed by counsel Wells and Mr. Kaboli. Yet, at the trial Kaboli, under questioning by Mr. Wells, admits that "what is contained in the letters is not really accurate." Trial Transcripts page 133, lines 5-7.

Therefore, Mr. Kaboli and his counsel have violated the most fundamental rule of pleading, Rule 11, which imposes serious sanctions upon its violators.

NRCP 11 provides, in pertinent part:

> "If a pleading is not signed or is signed with the intent to defeat the purposes of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action."

Mr. Kaboli admits that he filed false documents, under oath. His attorney acknowledges at trial that his client knew when he signed the letters that the documents and claims based thereon were false and sham. The only appropriate course, under the circumstances is to strike the entire pleading of the Plaintiff pursuant to Rule 11.

KABOLI MAY NOT RECOVER UNDER A CLAIM OF PARTNERSHIP INTEREST, BECAUSE THERE HAS BEEN NO ACCOUNTING AS REQUIRED BY LAW

Kaboli, in addition to claims for wages and lease payments, predicated upon documents now admitted to be false, contends that he was a partner in G.M. Credit and as such is entitled to monies from Defendant Nistank and/or the G.M. Credit business and as such is entitled to monies from Defendant Nistank and/or the G.M. Credit business. All of these claims are, as a matter of law, unsupportable both under the statutes governing partnership actions and under the recent Nevada Supreme Court decision, Rasmussen v. Thomas, 98 Nev. 216, 644 P.2d 1030 (Nev. 1982). The Rasmussen case was cited by Nistank's counsel early in the trial. See Trial Transcript page 39.

Rasmussen holds very specifically that it is reversible error to return to a partner his

capital contributions without first requiring an accounting or settlement of the partnership affairs. Nistank's counsel pointed out the law during the testimony of Thomas Glennon, an accountant, and has on numerous occasions made clear Nistank's position on the partnership claims that without an accounting it is error to attempt to divide up or determine the partnership claim of Kaboli, assuming without conceding that a partnership did exist.

For example, Nistank's counsel stated at pages 51-52:

> "**Mr. Johns:** "Your Honor, if I might, one of the Plaintiff's counts or causes of action was for an accounting in order to determine whatever his interest in the G.M. Credit partnership, as he alleged, was. He comes into Court not having carried his clear burden of conducting an accounting to show the - -
>
> **The Court:** Well, he hasn't put on his case yet.
>
> **Mr. Johns:** Well, maybe he's going to do an accounting.
>
> **The Court:** Well, I would assume he would.
>
> **Mr. Johns:** All right. But let me ask the witness this question, then.
>
> **Q.** Mr. Glennon, based upon the

information that you carried in Exhibits 1, 1-A and 2, is it possible for to render an accounting for the business known as G.M. Credit for the period prior to January 18, 1980?

A. No, from the records that have been give to me I could not.

The Court: He has already answered that question.

By Mr. Johns:

Q. So the figures that appear in here beginning January 18, 1980 do not represent an accounting of the G. M. Credit business prior to that time?

A. No, they do not."

Clearly, Nistank's position was then and is now that there has been no accounting, nor can one be done. Certainly Mr. Glennon did not do one and indicated he could not do one. The Court assumed, as did Nistank's counsel, as the excerpt above attests, that Kaboli would present an accountant to render the accounting required by law.

Now it is clear, that Kaboli's counsel intends to rely upon Mr. Glennon's testimony and exhibits as the accounting required by law. The following excerpts from the Transcript shows this.

Mr. Wells: "As I told the Court yesterday in my opening statement, the breakthrough as far as our case is concerned came when they (Nistank and Fayeghi) started fighting with each other and did these accountings, had their own accountant, Mr. Glennon, do it. That's all their work. We are relying on that."

Now, after Plaintiff has presented his entire case, it is clear that he has presented no accounting upon which the Court can determine the respective interest of the parties. Let us now look at the applicable law governing the winding up of partnerships, which is governed by statute and case law, directly on point.

NRS 87.010 to 87.430 governs Partnerships. Since Mr. Kaboli contends that G.M. Credit business was a partnership he, like Mr. Nistank, must be governed by the law of Partnerships in Nevada. This includes dissolution, which is defined specifically in NRS 87.290:

"Dissolution defined. The dissolution

of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business."

NRS 87.400 then sets forth the rules for distribution after a dissolution.

> "In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:
> 1. The assets of the partnership are:
> (a) The partnership property,
> (b) The contributions of the partners necessary for the payment of all the liabilities specified in subsection 2;
> 2. The liabilities of the partnership shall rank in order of payment as follows:
> (a) Those owing to creditors other than the partners,
> (b) Those owing to partners other than for capital and profits,
> (c) Those owing to partners in respect of capital,
> (d) Those owing to partners in respect of profits."

What evidence has Kaboli presented to this Court to permit any distribution pursuant to the mandates of NRS 87.400 assuming g a partnership has been shown? Has he

presented an accounting of (a) the assets of the partnership, (b) the contributions of the partners, or (c) the liabilities of the partnership? The answer to all three is in the negative. He asks that this Court arbitrarily make an award to him from the partnership without meeting his burden of rendering an accounting to the court. This the Court cannot do. In Rasmussen, supra, our Supreme Court made clear the necessity of an accounting and declared that it would be reversible error to make distributions of the partnership until an accounting was rendered. They stated: "Ordinarily, actions between partners with respect to partnership business are not maintainable until there has been an accounting or settlement of the partnership affairs. See Clark v. Edris, 585 P.2d 264 (Ariz. App. 1978); Lau v. Valu-Bilt Homes, Ltd., 582 P.2d 195, 200 (Hawaii 1978); Ewing v. Owens, 441 P.2d 964, 966 (Okla. 1968).

The alleged partnership ceased to exist on January 18, 1980, when the business was closed down. It was not closed down by Nistank, as the testimony clearly shows. It was Kaboli who, by his own testimony intentionally refused to comply with the requirements of the City of North Las Vegas and thereby caused its closure. He alleges that his own counsel, Howard Jones, told the City of North Las Vegas and thereby caused its closure. He alleges that his own counsel, Howard Jones, told the City of North Las Vegas:

> "We don't wish to do it. If you want to close it, please go ahead and close it."
>
> Trial Transcript page 106, lines 20-22.

Moreover, Mr. Kaboli testified that N.L.V. City Councilman, and currently Municipal Judge Gary Davis told Mr. Kaboli that North Las Vegas could not "make me to do it." (Comply with regulations regarding commercial property.)

Thus, it was Mr. Kaboli who consciously closed the business down by defying the N.L.V. City Counsel to compel compliance with N.L.V. regulations. That is unquestionably one of the most significant causes of dissolution. NRS 87.310 provides:

> "Dissolution is caused. . ..
>
> 3. By any event which makes it unlawful for the business of partnership to be carried on or for the members to carry it on in partnership."

The other cases cited with approval by our Supreme Court in Rasmussen which clearly mandate on accounting quoted from in pertinent part below.

Ewing v. Owens, 441 P.2d 964 at page 966:

> "In summary, plaintiff sought to maintain an action at law for breach of a partnership agreement and to recover the value of his share of the partnership business, while defendants denied the existence of a partnership relation."

At Page 967:

> "[3] In proposition two, defendants contend there is insufficient evidence to determine the value of Plaintiff's interest in the partnership. This contention appears to be correct. Until there has been a final settlement of the partnership affairs (upon ascertaining the surplus, if any, after discharging liabilities and collecting its assets), and the value of a partner's share has been determined on this basis, a judgment for a definite amount cannot be rendered."

In Lau v. Valu-Bilt Homes, Ltd, 582 P.2d 195 at page 200:

> "[3,4] We have recognized in this jurisdiction the general rule that ordinarily "an action at law will not lie in favor of a partner against another partner upon a defendant growing out of a partnership transaction until there has been a settlement of accounts and a balance struck," Holmes v. Mello, 15 Haw. 72, 73 (1903); Harrison v. Magoon, 13 Haw. 339, (1901); Fernandez v. Camara, 12 Haw. 183 (1899)."

And at page 202:

> "Consequently, we think that appellee's claim for contributions based on his first cause of action involved the unravelling of extensive and complicated accounts which could not be convenient-

> ly or accurately investigated and adjusted by a jury. Further, this dispute involves a fiduciary relationship between appellee and the other joint venturers and obviously requires an accounting to settle it."

Our Supreme Court in upholding a 41(b) motion set forth the applicable standard in Alford v. Harolds Club, 669 P.2d 721 (Nev. 1983) at 724:

> "[2,3] The standard of review applicable to an involuntary dismissal under NRCP 41(b) is well established. A defense motion for involuntary dismissal pursuant to NRCP 41(b) admits the truth of the plaintiff's evidence and all inferences that reasonably may be drawn therefrom, and the evidence must be interpreted in a light most favorable to the plaintiff. Baley & Selover v. All Amer. Van, 97 Nev. 370, 373, 632 P.2d 723)1981); Humboldt Basis Newspapers v. Sunderland, 95 Nev. 794, 797, 603 P.2d 278 (1979)."

CONCLUSION

Plaintiff has rendered no accounting upon which he can recover any sum from Nistank or G.M. Credit. He implied he would present documenting evidence of/or an

accounting. He has failed to meet his burden. He did call Defendant's own accountant, Mr. Glennon, who testified no records are available from which such an accounting could be rendered.

To render any judgment regarding Plaintiff's partnership violates Chapter 87 of our Statutes and would amount to reversible error under Rasmussen. Plaintiff's claim for wages and rent should be deemed as false and sham, by Plaintiff's own admission, and his remaining claims based upon allegation of a partnership must be dismissed because he has presented no evidence from which an accounting could be done, even though this

matter has been in litigation for over 5 years.

Respectfully
submitted,

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